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No. 04-294

In the Supreme Court of the United States

JOHN FOUNTAIN, AKA CHICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the wire fraud statute, 18 U.S.C. 1343, prohibits the use of interstate wires in the United States to execute a scheme to defraud a foreign government of tax revenue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1.1-1.20) is reported at 357 F.3d 250. The opinion of the district court (Pet. App. 1.21-1.47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2004. A petition for rehearing was denied on June 1, 2004 (Pet. App. 1.48-1.49). The petition for a writ of certiorari was filed on August 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of New York, peti-

tioner was convicted of conspiring to launder money, in violation of 18 U.S.C. 1956(h). See Pet. App. 1.23-1.24. He was sentenced to 84 months of imprisonment, which was later reduced, on the government's motion pursuant to Federal Rule of Criminal Procedure 35(b), to 60 months of imprisonment. *Id.* at 1.24.

Petitioner subsequently filed a motion for collateral relief under 28 U.S.C. 2255. Pet. App. 1.2. The district court denied the motion, but granted petitioner a certificate of appealability. *Ibid.* The court of appeals held that petitioner was not entitled to collateral relief. *Id.* at 1.20.

1. Petitioner participated in a conspiracy involving the smuggling of tobacco and liquor products across the St. Regis Mohawk Indian Reservation from the United States into Canada. Pet. App. 1.22. In order to advance the smuggling operation, the defendants made international and interstate telephone calls and facsimile transmissions. *Ibid.* They then sold the products on the black market in several Canadian cities. *Ibid.* Their scheme defrauded Canada of duties and taxes owed on the importation of the tobacco and liquor into Canada. *Ibid.*

Petitioner's role in the conspiracy was to assist in the laundering of the Canadian currency that was generated by the sale of the products on the black market. Pet. App. 1.22-1.23. He owned a currency exchange business in Hogansburg, New York, which is near the Indian reservation, and exchanged Canadian currency for United States currency. *Ibid.*

The superseding indictment charged petitioner and 20 others with, among other charges, conspiring to launder the proceeds of wire fraud. Pet. App. 1.3, 1.22. Petitioner pleaded guilty to Count 2 of the superseding indictment, which was one of the money-laundering

conspiracy counts. *Id.* at 1.23-1.24. Although the indictment charged petitioner with intent to defraud both the United States and Canada, petitioner would admit at his plea allocution only that he had participated in a scheme to deprive the Canadian government of revenue. *Id.* at 1.4. Although petitioner filed a notice of appeal, he subsequently discontinued it voluntarily. *Id.* at 1.24.

2. Petitioner filed a motion for collateral relief under 28 U.S.C. 2255. Pet. App. 1.5-1.6. He claimed that he had not violated the wire fraud statute because (1) the Canadian government's claim of uncollected taxes did not constitute "property" for purposes of the wire fraud statute, (2) Congress did not intend the wire fraud statute to protect a foreign government's rights against a scheme to defraud, and (3) United States courts do not have jurisdiction over the alleged fraud because it occurred beyond the territorial jurisdiction of the United States. *Ibid.* He also claimed that he had been denied effective assistance of counsel because of his counsel's failure to raise these issues. *Id.* at 1.6.

The district court denied petitioner's Section 2255 motion. Pet. App. 1.6. It found that he had procedurally defaulted, and that he could not overcome the default by showing either cause and prejudice or actual innocence. *Ibid.* The district court further held that petitioner's counsel had not been ineffective. *Ibid.* Nonetheless, it granted petitioner a certificate of appealability on two questions: (1) whether petitioner's counsel had been ineffective for having failed to raise his revenue rule defense and (2) whether the conviction was obtained without proof beyond a reasonable doubt of each element of the crime. *Id.* at 1.6-1.7.

3. The court of appeals denied petitioner's motion. Pet. App. 1.20. It held that petitioner's ineffective as-

sistance claim failed because he could not demonstrate prejudice in light of Second Circuit precedent established in *United States* v. *Trapilo*, 130 F.3d 547 (1997), cert. denied, 525 U.S. 812 (1998), in which the court had held that the revenue rule did not bar a prosecution under the wire fraud statute based on a fraudulent scheme to deprive Canada of duties and taxes. *Id.* at 1.8-1.9. The court interpreted petitioner's second claim certified by the district court for appeal as asking whether petitioner was actually innocent of money laundering because of his claim that taxes owed no longer constitute property after this Court's decision in *Cleveland* v. *United States*, 531 U.S. 12 (2000). Pet. App. 1.9. The court of appeals rejected that claim as well, holding that courts have long considered uncollected taxes property for purposes of the wire fraud statute, and that *Cleveland* v. *United States* did not undermine those holdings. *Id.* at 1.19.

DISCUSSION

Petitioner contends that, in light of the common law revenue rule, the United States may not bring a wire fraud prosecution (or a money-laundering prosecution based on an underlying wire fraud) against persons who use the wires in this country to defraud a foreign government of tax revenue. Pet. Br. 6-10. He also claims that a scheme to defraud a foreign government of tax revenue does not satisfy the money or property requirement of 18 U.S.C. 1343 in light of *Cleveland* v. *United States*, 531 U.S. 12 (2000). Pet. Br. 11-12. Petitioner acknowledges that "[t]his Court is about to decide the issue raised by [petitioner] herein in the case of *United States v. Pasquantino*." *Id.* at 5. Because the government agrees that the issues that petitioner raises are essentially the same as those presented in

Pasquantino v. *United States*, cert. granted, 124 S. Ct. 1875 (2004) (No. 03-725), the Court should hold the petition in this case pending its decision in *Pasquantino*, and then dispose of it as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Pasquantino* v. *United States*, No. 03-725, and then disposed of accordingly.

Respectfully submitted.

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